

exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.”³⁰⁵ Likewise, to the extent parties have concerns relating to the exclusivity rules themselves,³⁰⁶ the instant proceeding clearly is not the proper forum in which to address such concerns, particularly given the pendency of the Commission’s program exclusivity “sunset” proceeding.³⁰⁷

With respect to the specific program access allegations advanced by commenting parties, the Applicants respond as follows:

1. Comcast-Specific Allegations

RCN and EchoStar complain about Comcast’s practices with regard to the licensing of programming. Their allegations are misleading in a number of respects and inaccurate in others. Comcast’s practices do not violate the Commission’s rules, are not anticompetitive, and provide no basis for concern about the proposed merger.

Despite RCN’s efforts to portray a “problem” warranting the Commission’s concern, the facts are that (1) RCN has been treated no differently than other affiliates of Comcast SportsNet (Philadelphia) (“CSN”), including Comcast’s own cable operations, and (2) RCN has at all times had access to – and has continuously carried – CSN and

merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules”); *AT&T-MediaOne Merger Order* ¶ 81 (same).

³⁰⁵ *AT&T-MediaOne Merger Order* ¶ 81 (citing *AT&T-TCI Merger Order* ¶ 38). In the *AT&T-MediaOne Merger Order*, the Commission also concluded that the merger transfer proceeding did not provide any “basis for the Commission to declare unlawful AT&T’s future exclusivity agreements to the extent they conform to current rules.” *Id.*

³⁰⁶ See BellSouth Comments at 31.

³⁰⁷ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 16 FCC Rcd 19074 (2001).

SportsNet-MidAtlantic. RCN alleges that Comcast “asserted that it is willing to execute a longer-term agreement” for RCN’s carriage of CSN, but implies that Comcast has acted otherwise.³⁰⁸ In fact, RCN was presented with a five-year agreement for CSN in October 2001 but has chosen not to sign it (though it continues to carry the network); approximately 12 other terrestrial MVPDs, by contrast, have executed this agreement. RCN admits that it has a contract to carry SportsNet-MidAtlantic through 2006.³⁰⁹

EchoStar seeks to use the merger proceeding to obtain what it is not entitled to under the program access law passed by Congress. The Commission has already thoroughly investigated complaints filed by EchoStar (as well as DirecTV) on this matter and found them to be without merit.³¹⁰ Although EchoStar (and DirecTV) appealed the Commission’s decisions,³¹¹ Comcast is confident that the Commission’s decisions in both cases will be upheld.

Moreover, EchoStar claims that the “lack of regional sports available to DBS subscribers has undercut the DBS industry’s ability to compete” and that “Philadelphia has by far the lowest DBS penetration rate of any major U.S. market.”³¹² Both of these

³⁰⁸ RCN Comments at 20 n.34.

³⁰⁹ *Id.* at 19, 20 n.34.

³¹⁰ Specifically, the Commission found that CSN was a new network (not a network that had been “moved” from satellite) and that CSN (like many other local and regional networks) legitimately used terrestrial distribution to reach its customers because it was cheaper and more efficient than satellite distribution. *DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999) (subsequent history omitted).

³¹¹ See *EchoStar Communications Corp. v. FCC*, Civ. Action No. 01-1032 (D.C. Cir., filed Jan. 19, 2002).

³¹² EchoStar Comments at 4.

statements are false. First, DBS has abundant access to regional sports. DirecTV, a DBS company, carries more regional sports networks than any cable company, and has procured various packages from the sports leagues offering hundreds of games per league per season.³¹³ That this programming is available on DirecTV, but not EchoStar, reflects the different business plans of, and competition between, DirecTV and EchoStar, but it has nothing to do with Comcast, let alone the AT&T Comcast merger.³¹⁴ Second, DBS is an aggressive and successful MVPD competitor in the Philadelphia area. DirecTV has even targeted Philadelphia as a growth market, with one DirecTV official stating that it is among the “areas where we feel the market conditions are ripe to attract customers away from cable.”³¹⁵ These clearly are not the words of a company that feels it is unable to compete.

³¹³ DirecTV offers 20 regional sports networks (*see Sports Networks* (last visited May 20, 2002), *available at*: <<http://www.directv.com/DTVAPP/see/SportsPack.jsp>>), in addition to the NFL Sunday Ticket, NBA League Pass, MLB Extra Innings, and NHL Center Ices packages, among others. *See Sports Subscriptions* (last visited May 20, 2002), *available at*: <<http://www.directv.com/DTVAPP/see/SportsSubscriptions.jsp>>.

³¹⁴ In addition, until recently, EchoStar (like DirecTV) chose not to avail itself of the opportunity to carry additional sports programming that is readily available in Philadelphia. Several dozen games of the Phillies, Flyers, and Sixers are carried each year in Philadelphia on broadcast television, through the Philadelphia UPN affiliate, WPSG. DBS companies now have an absolute legal right to carry these stations, and one would think they would do so if regional sports are so essential to their ability to compete. And yet EchoStar (and DirecTV) have only recently added WPSG to their line-ups. Even then, WPSG apparently was only added in order to comply with the “carry-one-carry-all” requirement of Section 338 of the Communications Act, which went into effect on January 1, 2002. 47 U.S.C. § 338, as amended by the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999) (requiring satellite carriers, by Jan. 1, 2002, to carry upon request all local television broadcast stations’ signals in local markets in which the satellite carriers carry at least one television broadcast signal pursuant to the statutory copyright license and subject to other carriage provisions of the Act); *see also* Business News in Brief, *The Philadelphia Inquirer*, at D13 (Dec. 29, 2001).

³¹⁵ Buffalo News, 2001 WL 6344851 (May 13, 2001).

Moreover, EchoStar is incorrect in asserting that DBS penetration in Philadelphia is “by far the lowest of any major U.S. market.”³¹⁶ The Applicants are aware of data which show that (i) DBS penetration in Philadelphia is comparable to that in a number of other large markets, and (ii) the growth rate for DBS is exceptionally strong in Philadelphia. In particular, recent data from Nielsen Media Research and Forrester Research indicates that the actual DBS market penetration in the Philadelphia area is *not* 3.9%, as EchoStar claims, but in the range of 5.3% to 8.5%.³¹⁷ DBS penetration is comparable in San Diego (5.5% to 7.6%) and Boston (5.3% to 7.5%).³¹⁸ Further, DBS growth over the past two years is faster in Philadelphia (141%) than the average growth of every region of the country (two-year growth rates range from 88% in the Midwest to 121% in the Northeast), and exceeds the average two-year growth of all of the top 10 markets (120%).³¹⁹ The three-year growth rate from 1999 to 2002 for DBS penetration in Philadelphia (217%) is the third-highest growth rate among the top 39 DMAs.³²⁰

³¹⁶ EchoStar Comments at 4.

³¹⁷ Nielsen Media Research, *DMA Household Universe Estimates: May 2002* (5.3%) (“*Nielsen Media Research*”); Forrester Research, *Technographics Survey & Data* (survey conducted March 2002) (8.5%) (for survey overview, see Forrester Research, *Technographics Survey and Data*, available at: <<http://www.forrester.com/ER/Research/Survey/Excerpt/0,5449,285.00.html>> (last viewed May 20, 2002) (“*Forrester Research*”). BellSouth claims the DBS penetration number is even lower (3.7%). BellSouth Comments at 29. The source cited by BellSouth, however, is from an article that is nearly a year old. The article does not present any underlying data or indicate what year the data covers.

³¹⁸ *Nielsen Media Research* (5.5% and 5.3% for San Diego and Boston, respectively); *Forrester Research* (7.6% and 7.5% for San Diego and Boston, respectively).

³¹⁹ *Nielsen Media Research*; see also Horizon Media, *Beam Me Down* (Feb. 2000), available at: <http://www.horizonmedia.net/news/prior_news/feb00.asp>.

³²⁰ *Forrester Research*.

EchoStar's interest in carrying Comcast's local programming channel, cn8, is also questionable, especially while EchoStar is litigating to avoid carrying local broadcast stations that have higher ratings than cn8.³²¹ Comcast has never denied EchoStar access to cn8. And even if EchoStar were interested in carrying localized community service programming, it has not explained why it needs to expropriate for its own use the new local programming that Comcast has not yet created, rather than creating its own rival programming. Obviously, the latter course of action would do more for competition and diversity.

2. AT&T-Specific Allegations

a. TV Land

ACA reiterates the same allegations it made in the Commission's pending program access exclusivity rulemaking, in which ACA asserted that its members "cannot obtain access to certain programming [*i.e.*, TV Land], reportedly due to exclusive contracts with AT&T."³²² Although AT&T has no such exclusive arrangement with TV Land³²³ and the owner of TV Land, Viacom, who controls all distribution rights for the

³²¹ cn8 is essentially a local origination channel with original programming, local news, weather and sports. Any other producer who has a true desire to serve the local community is equally free to establish local studios, hire local talent, send cameras and crews to cover local high school games, and so on.

³²² ACA Comments at 14; *see also* ACA Comments CS Docket No. 01-290, at 15-16 (filed Dec. 3, 2001) (program exclusivity proceeding).

³²³ *See* AT&T Reply Comments, CS Docket No. 98-82, at 21 (filed Feb. 19, 2002), citing CFA Comments, CS Docket No. 98-82, at 128-29 (filed Jan. 4, 2002).